

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SCOTT TARKET,

Defendant-Appellant.

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UNPUBLISHED

March 27, 2007

No. 268415

Oakland Circuit Court

LC No. 05-204357- FH

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and was sentenced as a fourth habitual offender, MCL 769.12, to three and one-half to twenty years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The instant case arose from allegations that during a domestic dispute on August 30, 2005, defendant choked and threatened to kill his girlfriend.

On appeal, defendant first contends the prosecutor engaged in misconduct by suggesting that he attempted to attack the complainant with a knife. Specifically, defendant asserts that, by presenting testimony that he dragged the complainant into the kitchen of her apartment and reached for the drawer where she keeps her knives, the prosecution unfairly portrayed him as a "knife wielding killer" and deprived him of a fair and impartial trial.

Defendant failed to object to the prosecutor's line of questioning at trial, resulting in forfeiture of the issue. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Generally, we review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). But because defendant failed to preserve the issue, we may only review it for plain error affecting his substantial rights. *Carines, supra*, 764-765; *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003).

When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the lower court record and evaluate the alleged misconduct in context to determine "whether the defendant was denied a fair and impartial trial." *Goodin, supra*, 432. A prosecutor's good-faith effort to admit evidence cannot provide the basis for a finding of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).

To obtain a conviction, prosecutors must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The elements of assault with intent to do great bodily harm less than murder are “(1) an assault, i.e., ‘an attempt or offer with force and violence to do corporal hurt to another’ coupled with (2) a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922). The requisite intent can be inferred from the surrounding facts and circumstances. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. See *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Although all evidence is prejudicial to some extent, unfair prejudice occurs only when a probability exists that minimally probative evidence will be given undue weight by the jury or “it would be inequitable to allow the proponent of the evidence to use it.” *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Here, the complainant’s testimony was relevant to establish the intent element of the crime charged. A rational jury could infer, based on evidence that defendant reached for a knife while attacking the complainant, that he intended to do great bodily harm less than murder. The testimony’s probative value outweighed any danger of unfair prejudice to defendant and the prosecution did not engage in misconduct by presenting it to the jury. Consequently, defendant cannot establish plain error affecting his substantial rights.

Additionally, defendant asserts he was denied the effective assistance of counsel because his trial attorney committed a critical error by informing the jury that he was on parole at the time of the alleged incident.

To establish ineffective assistance of counsel, the attorney’s performance must have been “objectively unreasonable in light of prevailing professional norms” and “but for the attorney’s error or errors, a different outcome reasonably would have resulted.” *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). This Court “neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In the instant case, the complainant testified that defendant had been drinking on the night of the incident and that she and defendant had a heated disagreement. On cross-examination, defense counsel asked whether she was aware that defendant was on parole for an alcohol related offense and, as a condition of that parole, was not supposed to be in possession of alcohol. When the prosecution objected, defense counsel explained that the question went to possible bias and whether the complainant had a motive to lie to get defendant into trouble.

Defense counsel's statement at trial shows that he revealed defendant's parolee status in an attempt to attack the complainant's credibility by showing she had a possible motive to falsify her testimony. Although defendant attempts to characterize defense counsel's actions as absurd, he cannot overcome the strong presumption that they constituted sound trial strategy. The mere fact that a particular strategy was unsuccessful does not mean that it constitutes ineffective assistance of counsel. *Matuszak, supra*, 61.

Additionally, defense counsel revealed that defendant was on parole for an alcohol-related offense. Such information has little probative value in regard to whether defendant would be likely to commit a violent crime such as assault with intent to do great bodily harm. As the prosecution asserts, defendant's guilt was established by a substantial amount of evidence, including the testimony of both the complainant and the arresting officer. Thus, defendant cannot show that a different outcome reasonably would have resulted had defense counsel not mentioned his parolee status in front of the jury. Consequently, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens